# Multi-Purpose Holdings Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3-14-1 OF 1997
NIK HASHIM JC
9 AUGUST 1997

***Revenue Law*** *— Share transfer tax — Agreement for sale of shares — Agreement subject to approval of government — Whether Share (Land Based Company) Transfer Tax Act 1984 as amended by Finance (No 2) Act 1985 applied to disposal of shares — Whether at date of agreement, the disposal of the shares was a completed transaction — Whether the date of the agreement per se would determine the applicability of the Share (Land Based Company) Transfer Tax Act 1984 — Whether the approval of the Foreign Investment Committee is the approval referred to in s 5 — Share (Land Based Company) Transfer Tax Act 1984 ss 3 & 5 — Finance (No 2) Act 1985*

By an agreement dated 6 July 1984 ('the agreement'), the appellant agreed to transfer shares to the purchasers. The agreement was conditional upon approval by the government and regulatory authorities. The appellant applied for and obtained the approval of the Foreign Investment Committee ('the FIC') on 3 October 1984 and the approval of Bank Negara Malaysia on 8 November 1984 for the sale of the shares. The Special Commissioners of the Income Tax decided that the Share (Land Based Company) Transfer Tax Act 1984 ('the STTA'), as amended by the Finance (No 2) Act 1985 ('Act 323'), and brought into force on 19 October 1984, applied to the appellant's disposal of shares which was deemed to have taken place on 8 November 1984, the date when the government's approval was obtained and directed that the assessment of RM15,147,847.10 as share transfer tax be confirmed. The appellant appealed.

The issue before the High Court was whether the STTA as amended by Act 323 which came into force on 19 October 1984 applied to the appellant's disposal of the shares pursuant to the agreement, at which time the STTA had not yet been enacted. It was contended that the STTA does not have any application to the appellant's disposal of the shares as the disposal was already a completed transaction on 6 July 1984 under the agreement and any attempt to determine the disposal date by reason of the agreement would be contrary to law by reason of giving retrospective effect when no express statutory provision has been made in regard to completed transaction, ie disposal; that the proviso to s 5 of the STTA should not be interpreted so as to enlarge the disposal prior to 19 October 1984; and that the FIC's letter dated 3 October 1984 was the approval and the only authority that is referred to in s 5.

**Held**, dismissing the appeal:

The agreement was a contingent agreement by virtue of s 33(a) of the Contracts Act 1950. Until the government approval was given, the

agreement could not be said to be a completed and enforceable transaction. Thus, as at 6 July 1984, the agreement for the disposal of the shares was not yet a completed transaction as the agreement was subject to the approval by the government. That being so, the proviso was correctly applied to the appellant's agreement. The amendment to the proviso of s 5 clears the doubt that when a conditional approval is given, the date of disposal shall be the date on which the condition or last of the conditions is fulfilled. Thus, the date of the agreement per se did not determine the applicability of the STTA (see p 321F–I).

In this case, the FIC's letter dated 3 October 1984, by reason of the words 'FIC has no objection', was not an approval and the authority referred to in s 5. It was clear beyond doubt that by the contents of Bank Negara's letter, Bank Negara was the government authority referred to in s 5. Its approval must first be obtained before the disposal of the shares can be effected. Therefore, 8 November 1984, the date of the Bank Negara's letter which conveyed the government's approval, was the date of the government's approval in the context of s 5 of the STTA, and hence the date of the disposal of the shares. Since the government's approval was obtained after the effective date 19 October 1984 of the STTA, the STTA as amended by Act 323 was therefore correctly applied to the appellant's disposal of the said shares (see p 322C–H).

**[Bahasa Malaysia summary**

Melalui suatu perjanjian bertarikh 6 Julai 1984 ('perjanjian tersebut'), perayu bersetuju memindahmilik saham-saham kepada para pembeli. Perjanjian adalah bersyarat atas kelulusan kerajaan dan pihak berkuasa pengawalan. Perayu memohon dan memperolehi kelulusan Jawatankuasa Pelaburan Asing ('JPA') pada 3 Oktober 1984 dan kelulusan Bank Negara Malaysia pada 8 November 1984 untuk jualan saham-saham. Pesuruhjaya Khas Cukai Pendapatan memutuskan bahawa Akta Cukai Pindahmilik Saham (Syarikat Berdasarkan Tanah) 1984 ('ACPS'), seperti yang dipinda oleh Akta Kewangan (No 2) 1985 ('Akta 323'), dan dikuatkuasakan pada 19 Oktober 1984, terpakai kepada pelupusan saham perayu yang dianggap telah berlaku pada 8 November 1984, tarikh apabila kelulusan kerajaan diperolehi dan mengarahkan bahawa taksiran RM15,147,847.10 sebagai cukai pindahmilik saham disahkan. Perayu membuat rayuan.

Isu di hadapan Mahkamah Tinggi adalah sama ada ACPS seperti yang dipinda oleh Akta 323 yang berkuatkuasa pada 19 Oktober 1984 terpakai kepada pelupusan saham perayu menurut perjanjian tersebut, di mana ACPS belum lagi digubalkan pada masa itu. Ia dihujahkan bahawa ACPS tidak terpakai kepada pelupusan saham perayu kerana transaksi pelupusan telah pun sempurna pada 6 Julai 1984 di bawah perjanjian tersebut dan sebarang percubaan untuk menentukan tarikh pelupusan disebabkan perjanjian tersebut adalah menyalahi undang-undang disebabkan diberikan kesan kebelakangan

apabila tiada peruntukan statutori yang nyata telah dibuat berkaitan dengan transaksi yang disempurnakan, iaitu pelupusan; bahawa proviso s 5 ACPS tidak patut ditafsirkan bagi memperluaskan pelupusan sebelum 19 Oktober 1984; dan bahawa surat JPA bertarikh 3 Oktober 1984 adalah kelulusan dan satu-satunya pihak berkuasa yang dirujuk dalam s 5.

**Diputuskan**, menolak rayuan:

Perjanjian tersebut adalah suatu perjanjian kontinjen disebabkan s 33(a) Akta Kontrak 1950. Sehingga kelulusan kerajaan diberikan, perjanjian tersebut tidak boleh dikatakan adalah transaksi yang sempurna dan boleh dikuatkuasakan. Justeru itu, pada 6 Julai 1984, perjanjian untuk pelupusan saham-saham belum lagi menjadi transaksi yang disempurnakan kerana perjanjian tersebut tertakluk kepada kelulusan kerajaan. Dengan itu, proviso telah dipakai dengan betulnya kepada perjanjian perayu. Pindaan kepada proviso s 5 menjelaskan keraguan bahawa apabila kelulusan bersyarat diberikan, tarikh pelupusan adalah tarikh pada mana syarat atau syarat terakhir dipenuhi. Justeru itu, tarikh perjanjian tersebut per se tidak menentukan pemakaian ACPS (lihat ms 321F–I).

Dalam kes ini, surat JPA bertarikh 3 Oktober 1984, disebabkan perkataan-perkataan 'JPA tidak ada bantahan', bukanlah suatu kelulusan dan pihak berkuasa yang dirujuk dalam s 5. Adalah jelas melampaui keraguan bahawa menerusi kandungan surat Bank Negara, Bank Negara adalah pihak berkuasa kerajaan yang dirujuk dalam s 5. Kelulusan daripadanya mestilah diperolehi terlebih dahulu sebelum pelupusan saham boleh berkesan. Maka, 8 November 1984, tarikh surat Bank Negara yang menyampaikan kelulusan kerajaan, adalah tarikh kelulusan kerajaan dalam konteks s 5 ACPS, dan justeru itu tarikh pelupusan saham-saham. Oleh kerana kelulusan kerajaan hanya diperolehi selepas tarikh berkesan 19 Oktober 1984 ACPS, ACPS seperti yang dipinda oleh Akta 323 dengan itu telah dipakai dengan betul kepada pelupusan saham-saham perayu yang tersebut (lihat ms 322C–H).]

**Cases referred to**

*Duncan v Dixon* (1890) 44 Ch D 211 (refd)
*Kwong Borneo Development Co Sdn Bhd v DGIR* Kota Kinabalu High Court Tax Appeal No 01 of 1989, unreported) (refd)
*National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (refd)

**Legislation referred to**

Contracts Act 1950 s 33(a)
Income Tax Act 1967 Schedule 5 para 34
Interpretation Acts 1948 & 1967 s 19(1)
Finance (No 2) Act 1985
Share (Land Based Company) Transfer Tax Act 1984 ss 3, 5

*Anand Raj* (*Shearn Delamore & Co*) for the applicant. A

*Salmah bte Kassim* (Pegawai Undang-undang, Lembaga Hasil Dalam Negeri, Malaysia) for the respondent.

*Cur Adv Vult*

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**Nik Hashim JC**: This is an appeal by Multi-Purpose Holdings Bhd ('the appellant') by way of a case stated against the deciding orders of the Special Commissioners of the Income Tax pursuant to para 34 of Schedule 5 to the Income Tax Act 1967 ('the Act'). The Special Commissioners decided that the Share (Land Based Company) Transfer Tax Act 1984 ('the STTA'), as amended by the Finance (No 2) Act 1985 ('Act 323'), C and brought into force on 19 October 1984, applied to the appellant's disposal of shares which was deemed to have taken place on 8 November 1984, the date when the government's approval was obtained, and as such, they dismissed the appeal and directed that the assessment of RM15,147,847.10 as share transfer tax be confirmed.

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The facts are not in dispute. The appellant is a company incorporated on 18 August 1975. The appellant was the registered and beneficial owner of 6.5m shares in Dominion Holdings Sdn Bhd ('DH'), and 6.5m shares in Goodrich General Industries Sdn Bhd ('GG') ('the shares'). Both DH and GG were wholly-owned subsidiaries of the appellant and they collectively owned 24,405,994 ordinary shares in United Malayan Banking E Corporation Bhd. By an agreement dated 6 July 1984 ('the agreement') entered into between the appellant and Daan Sdn Bhd and Dani Sdn Bhd ('the purchasers'), the appellant agreed, inter alia, to transfer the shares to the purchasers for a consideration as set out in the agreement. The agreement, however, was conditional upon approval by the government F and regulatory authorities as set out in cl 3 therein. Pursuant to the aforesaid conditions, the appellant applied for and obtained what the appellant called the approval of the Foreign Investment Committee ('the FIC') on 3 October 1984. The appellant also obtained the approval of the Bank Negara Malaysia on 8 November 1984 for the sale of the shares.

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The issue before the High Court is whether the provisions of the STTA as amended by Act 323 which came into force on 19 October 1984 apply to the appellant's disposal of the shares pursuant to the agreement dated 6 July 1984, at which time the STTA had not yet been enacted.

It is the contention of counsel for the appellant that the STTA does not have any application to the appellant's disposal of the shares as the H disposal was already a completed transaction on 6 July 1984 under the agreement; and any attempt to determine the disposal date by reason of the agreement would be contrary to law by reason of giving retrospective effect when no express statutory provision has been made in regard to completed transaction, ie disposal. Counsel further submitted that the I proviso to s 5 does not apply to the present case. He argued that the proviso should not be interpreted so as to enlarge the disposal prior to 19 October 1984 as the disposal was already effected by virtue of the

agreement dated 6 July 1984 which is prior to the coming into force of the STTA on 19 October 1984. *Craines on Statute Law* (7th Ed) at p 218 by SGG Edgar and *Duncan v Dixon* (1890) 44 Ch D 211 were cited in support.

The respondent's counsel, on the other hand, argued that the STTA as amended by Act 323 is applicable to the appellant's case.

The relevant provisions of STTA for the purpose of this appeal are ss 3 and 5 which are as follows:

> 3 A tax, to be called share transfer tax, shall be charged in accordance with this Act on the value of every disposal of shares in a land based company on or after the 19 October 1984 under circumstances specified in section 4.
>
> 5 A disposal of a chargeable asset shall be deemed to take place —
> (a) where there is an agreement in writing or otherwise for the disposal of the chargeable asset, on the date of such agreement; or
> (b) where there is no agreement, on the date of delivery of the chargeable asset to the acquirer:
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> Provided that where in either case the disposal or acquisition of such chargeable asset requires the approval by the Government or an authority or committee appointed by the Government, the date of disposal shall be the date of such approval *or, where such approval is conditional, the date when the condition or last of the conditions is satisfied.*

The italicized words were inserted by Act 323 which also came into force with effect from 19 October 1984.

It is clear that the agreement which the appellant executed on 6 July 1984 is a contingent agreement by virtue of s 33(a) of the Contracts Act 1950. The parties by cl 3 of the agreement have entered into a contract for the sale of the shares conditional upon the approval of the transaction by the government over which the parties had no control. Until the government approval was given, the agreement could not be said to be a completed and enforceable transaction (*National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211). Thus, as at 6 July 1984, the agreement for the disposal of the shares was not yet a completed transaction as the agreement is subject to the approval by the government. That being so, the proviso was correctly applied to the appellant's agreement. In other words, the agreement is 'caught' by the proviso. The proviso is part of s 5, and therefore, it must be read together with the rest of the section including s 5(a). There is no ambiguity in the provisions of s 5 whatsoever. The amendment to s 5 made by Act 323 with retrospective effect to 19 October 1984 is not contrary to law as the effective date is expressly provided for under the amending Act 323 (see s 19(1) Interpretation Acts 1948 and 1967). Indeed, the amendment clears the doubt that when a conditional approval is given, the date of disposal shall be the date on which the condition or last of the conditions is fulfilled. The date of approval by the government constitutes the date of disposal. Hence, the date of the agreement per se does not determine the applicability of the STTA (see *Kwong Borneo Development Co Sdn Bhd v DGIR* Tax Appeal No 01 of 1989, High Court (Kota Kinabalu) (unreported)).

Accordingly, when was the government's approval obtained in this case? Counsel for the appellant contends that the FIC's letter dated 3 October 1984 is the approval and the only authority that is referred to in s 5. According to counsel, Bank Negara's approval is not a requirement under the section. In this regard, it is significant to note para 4 of the FIC's letter which reads:

> This is to inform you that the FIC has no objection to the acquisition by Daan and Dani of 40.7% interest in UMBC held by Goodrich and Dominion and the acquisition by MPHB of 51% interest in MFB held by Aslira *subject to the approval of Bank Negara Malaysia being obtained.* (Emphasis added.)

In my judgment, the FIC's letter dated 3 October 1984 by reason of the words 'FIC has no objection' in the letter, is not an approval and the authority referred to in s 5. It would appear from the FIC's letter that Bank Negara is the sole and the only authority to grant the approval for the disposal of the shares. Bank Negara by its letter dated 8 November 1984 said this to the appellant:

> We write to inform you that *the government has approved* the exchange of shares of United Malayan Banking Corporation and Malaysian French Bank between Multi-Purpose Holdings Bhd on the one hand and Daan Sdn Bhd and Dani Sdn Bhd on the other, as outlined in your letter dated 9 July 1984.
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> ...
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> 3 Additionally, *the government has also approved* the conditions attached to the agreement entered into between Multi-Purpose Holdings, Daan Sdn Bhd and Dani Sdn Bhd as follows: ... (Emphasis added.)

Thus, it is clear beyond doubt that by the contents of the above letter, Bank Negara Malaysia is the government authority referred to in s 5. Indeed it is. Its approval must first be obtained before the disposal of the shares can be effected.

I, with respect, agree with the learned Special Commissioners' finding that 8 November 1984, the date of the Bank Negara's letter which conveyed the government's approval of the conditions attached to the agreement, was the date of the government's approval in the context of s 5 of the STTA, and hence the date of the disposal of the shares. Since the government's approval was obtained after the effective date 19 October 1984 of the STTA, the STTA as amended by the Act 323, was therefore correctly applied to the appellant's disposal of the said shares. In the circumstances, I hold that the Special Commissioners' decision in the case stated is therefore right in law, and I hereby affirm their deciding orders and dismiss the appeal with costs.

*Appeal dismissed.*

Reported by Jafisah Jaafar